STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2007
v	No. 269468 Macomb Circuit Court
EARLAND JAMES COLLINS, Defendant-Appellant.	LC No. 2004-004394-FC

Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to rob while armed, MCL 750.89, carjacking, MCL 750.529a, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 18 years and 9 months to 80 years' imprisonment for the assault with intent to rob while armed, 18 years and 9 months to 80 years' imprisonment for the carjacking, and to 2 years' imprisonment for each of the felony-firearm offenses. We affirm.

Defendant's convictions arise from the assault and carjacking of the victim outside her residence in 2004. At approximately 10:00 p.m., the victim went outside to retrieve her purse from her car. While she was sitting in the car, a man later identified as defendant pointed a gun at her and demanded money. She stood up, and defendant grabbed her purse and threw it on the passenger seat, after which two other males opened the passenger door and began rummaging through her purse. Defendant made an obscene remark and tried to push the victim back into the car. A struggle ensued over the gun, during which the victim was struck in the face with the gun and defendant bit her arm in an attempt to get her to release her grip on the gun. The other two perpetrators grabbed her keys from her right hand and got into the car, and she released the gun from her left hand. Thereafter, defendant got into the driver's seat with the gun and the car sped away.

The victim identified defendant as the perpetrator with the gun at a photographic lineup conducted approximately one month after the incident.[1] She also identified defendant at his

[1] The victim did not identify anyone as the perpetrator at a photographic lineup conducted two days after the incident, but the record reflects that defendant's picture was not included in that (continued…)

preliminary examination and at trial. Defendant denied committing the assault and carjacking. He asserted that he was carjacked himself less than a month before the incident in this case, and suffered several gunshot wounds to both of his legs, which rendered him unable to commit the alleged offenses.

Defendant first argues that the trial court abused its discretion and denied him his constitutional rights to a fair trial, not to testify, and to present a defense, by denying his motion for the appointment of an eyewitness identification expert. We disagree. We review "a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert for an abuse of discretion." *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). The abuse of discretion standard acknowledges that there may be more than one reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado, supra* at 388; *Babcock, supra* at 269.

In order to show the trial court that an expert witness should be appointed for an indigent defendant, the defendant must show that he cannot safely proceed to trial without the witness. MCL 775.15; *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Moreover, a defendant must establish a nexus between the facts of his case and the need for an expert. *Tanner, supra* at 443. "Without an indication that expert testimony would likely benefit the defense, it [is] not error to deny without prejudice [a] motion for appointment of an expert witness." *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995). It is not sufficient that a defendant show a mere possibility that the requested expert will be of assistance. *Tanner, supra* at 443. Further, a trial court's denial of a motion to appoint an expert witness does not warrant reversal unless it results in a fundamentally unfair trial. *People v Leonard*, 224 Mich App 569, 582; 569 NW2d 663 (1997).

Defendant contends that he could not safely proceed to trial without eyewitness identification expert testimony involving cross-racial identifications, because the victim is Caucasian defendant is African-American, and the victim's identification of him was the only evidence against him. Defendant asserts that the victim's identification of him as the perpetrator was unreliable based on judicially recognized factors to consider in determining the reliability of an eyewitness identification, including whether the witness and perpetrator had a prior relationship, and the victim's psychological state of mind during the offense.

The trial court did not abuse its discretion by denying defendant's motion to appoint an expert witness, because defendant was able to proceed safely to trial without one. Defense counsel cross-examined the victim regarding her description of the perpetrator given to the police immediately after the incident, her ability to observe him during the struggle, whether her attention was focused more on the gun than the attacker, and the amount of time that elapsed before the photographic lineup at which she identified defendant as the perpetrator. Defense counsel also cross-examined the police officer who responded to the victim's 911 call, regarding the victim's description of the offender . Thus, defense counsel was able to challenge the

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array.

victim's identification of defendant without an expert. Defense counsel also argued during opening statement and closing argument that the victim misidentified defendant, and defendant testified that his gunshot wounds rendered him unable to commit the offenses. Accordingly, defendant has not shown that expert testimony was necessary in order to safely proceed to trial, and the trial court did not abuse its discretion by denying defendant's motion to appoint an expert. MCL 775.15; *Lueth, supra* at 688.

Defendant also argues that the trial court erred by denying his motion requesting the court to instruct the jury on the unreliability of cross-racial identifications, and by failing to give any other identification instruction. We review de novo claims of instructional error. *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004). "If the jury instructions, taken as a whole, sufficiently protect a defendant's rights, reversal is not required." *People v Huffman*, 266 Mich App 354, 371-372; 702 NW2d 621 (2005).

Defendant relies on *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), overruled in part on other grounds by *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004), in support of his argument that the trial court should have instructed the jury regarding the unreliability of cross-racial identifications. This Court has previously recognized, however, that "*Anderson* does not require any special jury instruction regarding the manner in which a jury should treat eyewitness identification testimony." *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). Moreover, the trial court instructed the jury pursuant to CJI2d 3.6 regarding witness credibility, which aided the jury in determining whether to accept the victim's identification of defendant. The trial court instructed the jurors to consider whether the victim was able to see and hear clearly, how long she observed or listened, and whether anything may have distracted her. Accordingly, the jury instructions adequately accounted for defendant's theory of defense and sufficiently protected his rights. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005); *Huffman, supra* at 371-372.

Defendant next argues that the prosecutor's reference to the complainant as a "little white girl" and an "attractive blonde" constituted misconduct and denied him his due process right to a fair trial. Because defendant did not preserve this issue for appellate review, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence, or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

The law "abhors the injection of racial or ethnic remarks into any trial because it may arouse the prejudice of jurors against a defendant and, hence, lead to a decision based on prejudice rather than on the guilt or innocence of the accused." *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995). Further, our Supreme Court "is not hesitant to reverse where potentially inflammatory references are intentionally injected, with no apparent justification except to arouse prejudice." *Id.*

Defendant asserts that the prosecutor was attempting to appeal to the jurors' passions and prejudices when he referred to the victim as "an attractive blonde who saw three black males approach." Defendant's argument somewhat mischaracterizes the record. The prosecutor stated

that the victim noticed a group of black males walking toward her when she left her residence to retrieve her purse from her car. The prosecutor further stated that they were not saying anything to the victim, and "she didn't think anything of it." He referenced the victim as "an attractive young woman" only when describing her conversation with defendant after he pointed a gun at her and demanded money. The prosecutor stated as follows:

> Defendant could see [the victim's] big purse right there in the car, so he assumed she had money. [The victim] told him, "I don't have any money," so the defendant was going to take what he wanted next. What did he want next? . . . . You'll see [the victim] is about five foot five, blond hair, hazel eyes. She's an attractive young woman. Defendant told her next, "You're going to be a good piece of *** tonight.["]

Thus, it appears from the record that the prosecutor's reference to a group of black males was merely descriptive and intended to convey what the victim observed as she left her apartment. Because defendant's theory of defense was misidentification, the fact that the males were African-American was relevant. Further, the prosecutor's characterization of the victim as an attractive young woman was not meant to arouse prejudice or sympathy, but rather, to explain defendant's lewd comment to the victim after she told him she did not have any money. Accordingly, defendant fails to establish plain error affecting his substantial rights.

Defendant also takes issue with the prosecutor's reference to the victim as a "little white girl" during opening statements. The prosecutor stated the following:

> [“]You're going to be a good piece of *** tonight." One small oversight on [defendant's] behalf, though, one small problem with his plan, he thought [the victim] was a meek little scared white girl. And just like [the victim's] assumption [was] wrong about her safety as she walked out to her vehicle that night, the defendant's assumption that she was a meek little white girl [was] also wrong.
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> * * *
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> [The victim's] assumptions, initial assumptions on September 13th were wrong. The defendant's assumptions that he had a pretty little white girl that was going to do exactly what he said were wrong.

Defendant contends that these remarks were intended to inflame the passions of the jurors and dislike for himself as a person.

The prosecutor's references to the victim's race were improper and served no apparent legitimate purpose, however, defendant did not object to and contributed to the references during trial, and any prejudicial effect of the prosecutor's remarks could have been cured by a timely jury instruction. Therefore, reversal is not warranted. *People v Moorer*, 262 Mich App 64, 78; 683 NW2d 736 (2004). Moreover, in responding to the prosecutor's comments, defense counsel himself referred to the victim as a "poor little white girl" and to defendant as a "big black guy." Therefore, because defense counsel used the same expressions that defendant asserts were wrongful when used by the prosecutor, defendant has failed to establish plain error affecting his

substantial rights. Further, the trial court instructed the jury to consider only the evidence, cautioning that the arguments of the attorneys were not evidence. Jurors are presumed to follow instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant next contends that he was denied his state and federal constitutional rights to due process because he was handcuffed and shackled during trial. We disagree. Although defendant raised this issue at sentencing, there is no indication that he timely raised it during trial. Thus, this issue is unpreserved, and our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763, 774; *People v Solomon (Amended Opinion)*, 220 Mich App 527, 532; 560 NW2d 651 (1996).

"[F]reedom from shackling is an important component of a fair trial." *People v Williams*, 173 Mich App 312, 314; 433 NW2d 356 (1988). Shackling should be permitted only to prevent escape, to prevent harm to others, or to maintain a quiet and peaceable trial. *Id.* But in order to warrant reversal because of the use of shackles during trial, a defendant must establish prejudice. *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988).

The record suggests that defendant posed a security threat, since both the trial court and defense counsel mentioned security issues in the context of discussing the handcuffs and shackles. Maintaining security is a permissible purpose for the use of physical restraints. *Williams*, *supra* at 314. Further, it does not appear that the jury was able to see the handcuffs and shackles, because efforts were made to conceal them from the jury. Defense counsel stated during trial that he and the trial court had taken care not to expose the fact that defendant was wearing leg chains. Moreover, the trial court indicated that it was requiring witnesses to testify from the deputy's chair rather than the witness chair, "so that when the defendant testifies, the jury would not be aware of his being in shackles." Defendant did in fact testify from the deputy's chair where his shackles were apparently concealed, and while showing the jury scars on his legs from alleged gunshot wounds, the trial court and defense counsel ensured that both the shackles and handcuffs were concealed from the jury. Because no evidence suggests that the jury was able to see the restraints given the efforts to conceal them, defendant has not shown prejudice. See *People v Johnson*, 160 Mich App 490, 493; 408 NW2d 485 (1987). In addition, the record indicates that defendant was not handcuffed while testifying, because the trial court directed the deputy to handcuff him once he stepped down from the deputy's chair to demonstrate his leg wounds. Therefore, defendant has not established plain error affecting his substantial rights.

Defendant also argues that his state and federal constitutional rights to due process were violated because he was dressed in prison attire during trial. Although defendant raised this issue during sentencing, he did not make a timely objection before the jury was empanelled, thus resulting in the waiver of his right to be tried in civilian clothes. *People v Turner*, 144 Mich App 107, 109; 373 NW2d 255 (1985). In any event, defendant has not established prejudice because, the record shows that his clothing did not appear to be prison clothing, and the trial court instructed the jury to disregard the comment of an officer referring to defendant's clothing as prison attire.

When asked to identify defendant at trial, the officer stated that defendant "is wearing prison – a light-brown khaki outfit at the end of the table." Immediately thereafter, defense counsel moved for a mistrial, to which the trial court replied:

THE COURT: The Court notes that it has taken extra ordinary [sic] steps to prevent what has just happened. Even to the extent of having the witnesses testify from the – what would ordinarily be the deputy's chair, so that when the defendant testifies, the jury would not be aware of his being in shackles. Because if he was sitting in the witness chair, that would have been what they would have seen by necessity.

So, it is troubling to the Court that someone would testify, after all that has been done, that he is in prison garb. When, in fact, he is not in prison garb. So I'm not going to grant the mistrial because I think it is a misstatement that might be cleared up. This defendant is not in prison garb. That should not have been said.

* * *

But, again, the defendant's not in prison garb, so if this person describes this [a]s prison garb, it's very simple for this court to correct that by indicating that that is a misstatement. The defendant is not in prison garb. The defendant has been provided other clothing, in fact.

MR. FREERS [DEFENSE COUNSEL]: You are going to tell the jury that this is not a prison outfit?

THE COURT: I will. I mean, it clearly is not. These clothes were furnished to this defendant; was it not [sic]?

MR. FREERS: Judge, I don't know who provided him with the clothes to be honest with you.

THE COURT: Are these your clothing? Clothes?

THE DEFENDANT: No, they are not, sir. No, they are not, sir.

THE COURT: Ordinarily, counsel, I would expect that he would be placed in other garb. It may very well be prison garb as far as I know.

MR. FREERS: I'm not aware of it.

THE COURT: Although, it's not identified as such in any form or fashion.

The trial court instructed the jury to disregard the officer's comment concerning defendant's clothing, because it was completely speculative and did not constitute evidence .

The record thus shows that defendant's clothing did not appear to be prison attire, and that the trial court instructed the jury to disregard the officer's remark. Accordingly, even if defendant did not waive his right to wear civilian clothing at trial, he cannot demonstrate prejudice resulting from his attire worn during the proceedings.

Defendant next argues that the trial court erred by denying his motion for a mistrial based on the officer's remark. We disagree. We review a trial court's decision on a motion for a mistrial for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005).

As discussed previously, defendant cannot demonstrate prejudice resulting from the officer's comment, which the trial court instructed the jurors to disregard. Therefore, the trial court's denial of defendant's motion for a mistrial did not constitute an abuse of discretion.

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello